

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
CONSUMERS ENERGY COMPANY for a)	
determination of net stranded costs and for)	Case No. U-13380
approval of net stranded cost recovery charges.)	
_____)	

At the October 12, 2006 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

ORDER

On December 20, 2002, the Commission issued an order in this case in response to an application filed by Consumers Energy Company (Consumers) pursuant to MCL 460.10a. The application sought a determination of Consumers' net stranded costs in 2000 and 2001 and estimated net stranded costs in 2002, and approval of charges to recover those costs. Among other things, the Commission did not allow Consumers to include certain claimed costs of compliance with the federal Clean Air Act in the calculation of Consumers' 2000 and 2001 stranded costs. The Commission also ordered Consumers to issue credits to its retail open access (ROA) customers from its excess securitization savings that were equal to their securitization and tax surcharges.

Consumers appealed these two aspects of the December 20, 2002¹ order to the Court of Appeals. On September 13, 2005, the Court of Appeals issued a decision affirming the Commission's December 20, 2002 order with regard to the exclusion of the Clean Air Act costs. However, the Court of Appeals reversed the Commission's determination that Consumers should issue credits to its ROA customers from its excess securitization savings in amounts equal to their securitization and tax surcharges. In so doing, the Court of Appeals stated:

Thus, we hold that the PSC erred in allowing the securitization offset for ROA customers at issue to the extent that it was based on qualified costs that did not constitute stranded costs. Consistent with the due deference given to the PSC's administrative expertise, . . . we conclude that we must remand this case to the PSC for it to decide as an initial matter how to modify its treatment of this matter in light of this legal error. Specifically, on remand, the PSC first must decide to either (1) determine the part of the securitization offset for ROA customers attributable to stranded costs and only provide an offset for the portion of the securitization charge based on stranded costs or (2) abolish the securitization offset for ROA customers altogether. We also consider it appropriate for the PSC to initially determine what redress, if any, should be taken with regard to amounts already improperly paid out to Consumers' ROA customers from excess securitization savings.

Consumers Energy Co v Public Service Comm, 268 Mich App 171, 183-184; 707 NW2d 633 (2005).

¹The Commission denied Consumers' request for a rehearing in an order issued on December 13, 2003. Consumers also appealed the rehearing order.

Before taking any further action, the Commission issued an order on September 20, 2005, giving the parties to this proceeding² and other interested persons the opportunity to file briefs and reply briefs regarding the issues that were identified by the Court of Appeals' decision. The Commission identified these issues as follows:

- a. Whether the Commission should determine the part of the securitization offset for ROA customers attributable to stranded costs and only provide an offset for the portion of the securitization charge based on stranded costs?
- b. Whether the Commission should abolish the securitization offset for ROA customers altogether?
- c. What redress, if any, should be taken with regard to amounts already improperly paid out to Consumers' ROA customers from excess securitization savings?

On October 21, 2005, initial briefs were filed by the Staff, the Attorney General, ABATE, Energy Michigan, and Consumers. On November 4, 2005, reply briefs were filed by the same parties.

The Court of Appeals Opinion

Securitization charges were initially to be used to fund the 5% residential rate reduction mandated by MCL 460.10d(1). MCL 460.10d(5).³ If excess securitization charges existed, then, for a period of six years, 100% of these excess securitization savings, up to 2% of the electric

²The official parties include Consumers, the Commission Staff (Staff), Association of Businesses Advocating Tariff Equity (ABATE), Energy Michigan, Attorney General Michael A. Cox (Attorney General), The Kroger Co., the National Energy Marketers Association, Wolverine Power Marketing Cooperative, Midland Cogeneration Venture Limited Partnership, North American Natural Resources Inc., Adrian Energy Associates, L.L.C., Cadillac Renewable Energy L.L.C., Genesee Power Station Limited Partnership, Granger Electric Company, Grayling Generating Station Limited Partnership, Hillman Power Company L.L.C., Michigan Cogeneration Systems, Inc., Riverview Energy Systems, Sumpter Energy Associates Limited Partnership, Viking Energy of Lincoln, Inc., Viking Energy of McBain, Inc., Michigan Association of Broadcasters, the Michigan Petroleum Association/Michigan Association of Convenience Stores, Dow Corning Corporation, Hemlock Semiconductor Corporation, Ontario Power Generation, and Enbridge Energy, Limited Partnership.

³The current numbering of Section 10d is used throughout this order.

utility's commercial and industrial revenues, was to be allocated to the low-income and energy efficiency fund (LIEEF). MCL 460.10d(7). Any excess securitization savings beyond these amounts was to be allocated by the Commission to "further rate reductions or to reduce the level of any charges authorized by the commission to recover an electric utility's stranded costs." MCL 460.10d(6). In the Commission's December 20, 2002 order in this case, p. 16, Consumers' ROA customers received an offset to their securitization charges that was funded by excess securitization charges, pursuant to the latter statutory authorization.

The Court of Appeals found that the Commission failed to break out the proportion, if any, of non-stranded costs from all qualified costs in the December 20, 2002 order. All qualified costs are subject to securitization, and are non-bypassable. MCL 460.10h(g), 460.10i(3), 460.10j(1), 460.10k(2). Only stranded cost charges may be reduced through the use of excess securitization savings. MCL 460.10d(6). The definitions of 'qualified costs' and 'stranded costs,' while potentially overlapping, are not identical. *See*, MCL 460.10h(g) (definition of qualified costs); and June 5, 1997 order in Case No. U-11290, pp. 6-14, December 20, 2001 order in Case No. U-12639, pp. 10-11, and December 20, 2002 order in Case No. U-13380, p. 3 (definition of stranded costs). The Commission, in its December 18, 2003 order denying rehearing in this matter, p. 14, characterized the two types of costs as "closely related, if not always the same." However, the Court found that this matter should be remanded to the Commission for a determination of whether the qualified costs offset by the excess securitization savings consisted entirely of stranded costs. The Court charged the Commission with first deciding either to determine whether a portion of the offset is non-stranded or to abolish the offset altogether. The Court further charged the Commission with determining what redress, if any, would be appropriate should there have been a non-stranded cost element in the offset.

Positions of the Parties

In its reply brief the Staff argues that there is enough evidence in Case No. U-12505 (the underlying case in which the qualified costs were originally determined) to allow for a decision in this matter. The Staff further argues that the evidence shows that all of the qualified costs were also stranded costs. The Staff relies upon the testimony of Consumers Vice-President and Controller Dennis DaPra in Case No. U-12505, Tr 70, in which Mr. DaPra testifies that the qualified costs are all generation-related, as follows:

Q. How did Consumers Energy determine the amount of regulatory assets and regulatory liabilities which are qualified costs to be securitized?

A. The amount of regulatory assets and liabilities to be securitized was determined based on the portion of Consumers' regulatory assets and liabilities either totally or partially dedicated to the generation portion of the business. Where only a portion of the regulatory asset was applicable, the generation amount was determined by identifying the regulatory asset related to the generation portion of the business, or by using the allocation factors from Case U-10685, the Company's most recent rate proceeding.

The Staff argues that this testimony demonstrates that all of the qualified costs at issue in this matter are stranded costs.

The Staff further argues that this matter is moot, because, by its own admission, Consumers discontinued the offset in December 2004, when it began to apply 50% of the excess securitization savings to offset the stranded cost recovery charge. The Staff points out that the Court of Appeals, in an unpublished opinion issued on the same day as the remand order in this matter, refused to reach the merits of the same legal issue regarding the ROA offset, in an appeal filed by The Detroit Edison Company (Detroit Edison), on the grounds that the issue was moot because Detroit Edison had discontinued the offset. *Detroit Edison Co v Public Service Comm*, unpublished opinion *per curiam* of the Court of Appeals, decided September 13, 2005 (Docket No. 253317). The Staff argues that, because Consumers has discontinued the offset as well (a fact that the Court

of Appeals was apparently not apprised of at the time of its decision in this matter), this case is also moot.

Consumers contends that the offset was in place from December 2001 to November 2004, that none of the offset was stranded costs, that the full offset represents approximately \$14.3 million, and that this amount should be back-billed to ROA customers. Consumers relies on the findings in Case No. U-12505, as well as all of the Commission's stranded cost cases, to argue that the Commission has never found that any of these qualified costs were stranded costs. Consumers points out that the Commission actually excluded evidence in Case No. U-12505 on the issue of whether the qualified costs were stranded costs, because no such finding was necessary to the outcome. In its reply to the Staff, Consumers further argues that none of these costs can be stranded because all securitized costs were removed from the stranded cost calculation in this matter. Consumers argues that no further hearings are necessary, because there is sufficient evidence on the record in this case and the several cases leading up to it.

Like the Staff, ABATE and Energy Michigan argue that all of the costs at issue herein are stranded as revealed by the testimony of Mr. DaPra; that the issue is moot in any case; and that no further hearings are necessary.

The Attorney General argues that a better evidentiary record is needed in order to determine whether a non-stranded element exists within the qualified costs, and urges the Commission to hold a hearing.

Discussion

In July of 2000, in Case No. U-12505, Mr. DaPra testified to the nature of the qualified costs that eventually gave rise to the excess securitization savings at issue in this matter. Tr 70-75.⁴ His testimony indicates that the qualified costs are comprised of: (1) the Palisades nuclear plant's capital costs recorded as a regulatory asset, (2) the generating portion of certain other regulatory assets, (3) the unamortized cost on prior refunded debt, (4) the cost of issuing, supporting and servicing the securitization bonds, and (5) the cost of retiring and refunding existing debt and equity in connection with the issuance of the securitization bonds. Tr 70. Total qualified costs to be securitized were approximately \$473 million. When asked how Consumers determined the amount of regulatory assets and liabilities to be securitized, Mr. DaPra indicated that the company did so based upon the portion of the asset or liability that was dedicated to the generation portion of the business, this portion being determined either by direct evidence or by using allocation factors set by the Commission in a prior order. Tr 70. Mr. DaPra listed the specific regulatory assets and liabilities included in the requested qualified costs as follows: Palisades regulatory asset net capital costs; income taxes due from customers; other post employment benefits (OPEB); Department of Energy decommissioning and decontamination costs; Ludington settlement costs; reacquired debt; and Clean Air Act allowance⁵ benefits (a liability). Tr 70-75.

'Stranded costs' has no statutory definition in 2000 PA 141 (Act 141) or 2000 PA 142 (Act 142). Rather, the Commission was given broad power by the Legislature to determine net stranded costs. MCL 460.10a(1), 460.10a(17)(c). The Commission has determined that stranded costs are costs incurred during the regulated era that will be above market prices and those costs

⁴All transcript cites herein are to Case No. U-12505.

⁵Clean Air Act allowance costs and benefits have been dealt with in a separate line of cases. *See*, December 22, 2005 order in Case No. U-14148.

necessary to facilitate the transition to competitive markets, and that potential categories of stranded costs include: (1) regulatory assets, (2) capital costs of nuclear plants, (3) contract capacity costs arising from power purchase agreements, (4) employee retraining costs, and (5) costs related to implementing restructuring. June 5, 1997 order in Case No. U-11290, pp. 6, 10-11.

Mr. DaPra's testimony is detailed and comprehensive. The Commission finds that the evidence presented in Case No. U-12505 regarding the nature of the qualified costs in issue in that matter is sufficient to allow the Commission to make a determination as to whether those cost elements also meet the definition of stranded costs. The Commission agrees with ABATE, Energy Michigan, and the Staff, and is persuaded that Mr. DaPra's testimony demonstrates that all of the qualified costs identified in Case No. U-12505 fit the definition of stranded costs outlined in previous cases. Nuclear plant costs are an element of stranded costs. Regulatory assets and liabilities that are dedicated to generation are also included in stranded costs. The income taxes, OPEB costs, spent nuclear fuel related costs, Ludington settlement costs, and reacquired debt costs are all regulatory assets that would have been recoverable in future rates, and would have become stranded if they were no longer recoverable. All of these regulatory assets are ones for which, Mr. DaPra testified, the generation-related portion was determined when Consumers sought to classify these assets as qualified costs for securitization purposes in Case No. U-12505. The Commission finds that the offset funded by excess securitization savings provided a credit for qualified costs that also fit the definition of stranded costs. As such, the offset did not run afoul of MCL 460.10d(6) and no redress is necessary.

Consumers' argument that these costs cannot be stranded costs because all securitized costs were removed from the calculation of stranded costs in this matter is disingenuous. Securitized

costs are only removed from the calculation of stranded costs because the utility is already receiving revenue from the securitized assets. If an asset is already being paid for through securitization, it is not appropriate to include it in a subsequent stranded cost calculation. However, that does not mean that the asset does not fit the definition of a stranded cost.⁶ The Commission finds the offset was for charges that would have been stranded had they not already been subject to securitization, and that there was no non-stranded cost element included in the securitization charges that were offset by the credit.

The Commission notes that Consumers states that the offset was discontinued in December 2004. Detroit Edison had previously discontinued the offset. On appeal by Detroit Edison of the identical issue (the propriety of the offset) the Court of Appeals declined to reach the merits on grounds that the issue was moot, because “The practice challenged by Edison has ended and there is no appropriate remedy for Edison based on any past impropriety in this regard, . . . and, further, we do not believe that ‘it is likely to recur yet evade judicial review.’” *Detroit Edison Co v Public Service Comm*, unpublished opinion *per curiam* of the Court of Appeals, September 13, 2005 (Docket No. 253317), slip opinion, pp. 3-4 (citations omitted). The Commission is mindful that the Court of Appeals was unaware that the offset had also been discontinued in the Consumers case. Had it known, the Court may have found the issue to be moot in this case as well.

⁶It should go without saying that the Court of Appeals did not intend for the Commission to allow double recovery of these costs to Consumers by ordering recovery of them as both securitized costs and stranded costs.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 *et seq.*; 1919 PA 419, as amended, MCL 460.51 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AACCS, R 460.17101 *et seq.*

b. The 2001-2004 securitization offset for Consumers' ROA customers was attributable to stranded costs.

THEREFORE, IT IS ORDERED that the 2001-2004 securitization offset for Consumers Energy Company's retail open access customers was attributable to stranded costs.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

(S E A L)

/s/ J. Peter Lark
Chairman

By its action of October 12, 2006.

/s/ Laura Chappelle
Commissioner

/s/ Mary Jo Kunkle
Its Executive Secretary

/s/ Monica Martinez
Commissioner

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